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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PAUL VOGELGESANG, Plaintiff and Appellant, v. ANAHEIM DUCKS HOCKEY CLUB, LLC, et al., Defendants and Respondents.	G054654 (Super. Ct. No. 30-2015-00812954) O P I N I O N

Appeal from orders of the Superior Court of Orange County, Deborah C. Servino, Judge. Affirmed.

Workplace Justice Advocates, Tamara S. Freeze and Robert A. Odell for Plaintiff and Appellant.

Irell & Manella, Andra Barmash Greene and Heather Benzmiller Sultanian for Defendants and Respondents.

* * *

Plaintiff Paul Vogelgesang was employed in a risk management capacity by the Anaheim Ducks Hockey Club, LLC (the Ducks). He informed his superiors about what he believed were safety problems at the arena where the Ducks play, the Honda Center. Eventually, according to Vogelgesang, he was told to resign or that he would be fired, and he resigned. His attorneys then sent a demand letter to defendants which included a draft complaint. In response, defendants filed an arbitration claim, seeking a declaration of non-liability with respect to Vogelgesang's claims. Vogelgesang then filed the instant lawsuit, and defendants filed a petition to compel arbitration, which was eventually granted. Vogelgesang, at that point, decided not to have his claims heard as cross-claims by the arbitrator. In due course, the arbitrator ruled in defendants' favor, and the court confirmed the award, denying Vogelgesang's petition to vacate.

Vogelgesang contends this was error. He argues it was a misuse of the declaratory relief process, and violated California public policy as well as his unwaivable statutory rights. He also claims declaratory relief was not authorized by law. We conclude that these arguments are without merit. The broad scope of the arbitration agreement included potential declaratory relief claims, declaratory relief was an appropriate remedy, and no unwaivable rights were implicated. Vogelgesang made a deliberate tactical decision not to have the arbitrator hear his claims as cross-claims, and to the extent that made any difference at all in the outcome of the arbitration proceedings, he must now accept the consequences of that choice. Accordingly, we affirm the orders.

I

FACTS

Background Facts

We summarize the background facts only briefly due to the procedural posture of the case on appeal, beginning with identifying the various defendants. The Ducks is a professional hockey team owned by the Samueli family. The Honda Center is

owned by the City of Anaheim (which is not a party to this action) and managed by Anaheim Arena Management, LLC (AAM). H&S Ventures, LLC (H&S) is an entity formed by the Samueli family, and it provides management services to AAM and the Ducks. Shiloh, LLC is a revocable trust owned by the Samueli family. The Samuelis own, either directly or indirectly, the Ducks, AAM, H&S, and Shiloh. The individual defendants include Bernard Schneider, outside general counsel to the Ducks, and AAM. Lois Eisenberg is the elderly mother of Susan Samueli.

In July 2006, Vogelgesang was hired by defendants in the capacity of risk manager for H&S at a salary of $125,000 per year. He signed an employment agreement that included an arbitration clause that stated it applied to: "Any and all disputes . . . that arise out of Employee's employment." It also included a confidentiality provision, with respect to both business and personal information relating to the Samueli family.

According to Vogelgesang's complaint, in April 2012, testing was performed on the Honda Center's fire pump and sprinkler system, and, according to Vogelgesang, the system failed. A copy of the report was given to H&S's operations and engineering manager. Defendants maintained that the "fail" in 2012 was because of maintenance issues that did not impact the pump's performance.

In January 2013, Vogelgesang alleged, the fire pump was still not functioning properly and again failed inspection. Vogelgesang's complaint stated this was the first time he learned of the problem. From 2012 to mid-2015, Vogelgesang alleged that he pursued completing various safety-related repairs but authorization was persistently refused by H&S management.

According to evidence presented at the arbitration, in 2014, a report from a third party fire protection consultant stated the overall status of the system "very good," and noted the vast majority of recommendations from a prior report in 2008 had been addressed. The report made recommendations for further changes. The "most significant" issues related to the use of a manual, rather than an automated, smoke control

system, the need for written "guidance" for manually operating the system, several aspects of alarm system programming, failure to have the prior fire pump test analyzed, storage issues, and the need to continue to comply with recommendations from the 2008 report.

The report did not state the Honda Center was unsafe, or recommend that events be cancelled or postponed. According to the arbitrator's findings, by the end of October 2014, 98 percent of the items from the 2008 report had been completed and 85 percent of the items from the 2014 report had been completed. In December 2014, management informed Vogelgesang that due to the capital intensive nature of the repairs, the work would begin in July 2015. Vogelgesang stated that he did not recommend waiting until July. Thereafter, Vogelgesang began circulating e-mails objecting to the delay. In January 2015, defendants hired the consultant company to perform the additional improvements.

According to evidence presented during arbitration, the e-mails Vogelgesang circulated were the latest in a string of communications difficulties with defendants and their employees. The e-mails contributed to the deterioration of Vogelgesang's relationship with defendants and various executives.

In January 2015, according to arbitration testimony, one of these executives discovered that Vogelgesang had altered an e-mail from the consultant concerning the fire pump tests. Vogelgesang had deleted positive statements, including "'it appears that the pump is operating satisfactorily'" and "'[t]he issues previously identified were resolved.'" This executive informed Vogelgesang's immediate supervisor about the altered communications.

This supervisor, according to testimony offered during arbitration, met with Vogelgesang to discuss the matter. Vogelgesang admitted it was his "'standard practice'" to alter e-mails before forwarding them. This destroyed the supervisor's trust

in Vogelgesang, and the supervisor concluded he would have to resign or be terminated. This was communicated to Vogelgesang, who resigned on February 24, 2015.

Procedural Background

Several months after his termination, on May 15, 2015, Vogelgesang's attorneys, Robert A. Odell and Tamara S. Freeze, wrote a demand letter to the defendants, summarizing Vogelgesang's employment, the history of the alleged safety violations, and the various causes of action the attorneys intended to bring. In addition to the claims relating to retaliation for raising the safety issues, Vogelgesang alleged he was discriminated against and subject to a hostile work environment based on his Jewish heritage.[1]

The letter is far from subtle in its claims. It stated Vogelgesang was retaliated against for his reports that "the fire suppression & alarm and smoke control system at the Honda Center are not functioning properly and would not effectively protect Honda Center guests in the event of a fire," and that defendants "willfully put[] Honda Center staff and guests in danger by hosting large events with full knowledge that the arena's smoke control system is malfunctioning." According to defendants, and supported by an e-mail later produced by Vogelgesang, this letter was intentionally sent while the Ducks were in the middle of hockey playoffs, and the Honda Center was in the national spotlight.

[1] The basis for this assertion was later determined to be a single incident where Schneider, defendants' general counsel, referred to Vogelgesang as a "'putz'" in an e-mail. The arbitrator eventually concluded this claim was baseless: "The single email itself does not reflect any discrimination against [Vogelgesang] based on his religious background. [Citation.] Nor was there any credible evidence that any of the [defendants] discriminated against [Vogelgesang] or other employees based on their religious beliefs or background. It is hardly credible that [defendants] would have a policy or practice of discriminating on the basis of an employee's Jewish background, when the Samuelis are not only Jewish but are active supporters of Jewish religious causes." (Fns. omitted.)

Toward its conclusion, the letter stated: "If the case is filed, all of this information will become public and Mr. Vogelgesang will seek all available damages under the FEHA [(Fair Employment and Housing Act)], California Labor Code, and related statutes. I intend to take multiple depositions and engage in extensive discovery of Defendants' company policies, regulatory compliance procedures and any other relevant matters concerning Mr. Vogelgesang's claims. Mr. Vogelgesang will seek back pay, front pay, statutory attorneys' fees, emotional distress, and major punitive damages." It further stated: "Considering the high cost of litigation and extensive damage Mr. Vogelgesang's claims will inflict on [defendants] and the Samueli family, we have chosen to send this letter in order to explore a more expeditious and informal resolution."

The letter attached a draft complaint, which, counsel stated, would be filed if defendants did not contact counsel to "informally resolve" the matter within eight days. In addition to allegations about the Honda Center's purportedly unsafe conditions, including that defendants were "endangering the lives of all persons who attend events in the arena," the draft complaint also included allegations about the Samueli family's alleged religious discrimination, and named Eisenberg, Susan Samueli's 92-year-old mother, as a defendant in a cause of action for defamation.[2]

The draft complaint included causes of action for whistleblower retaliation (Lab. Code, § 1102.5, subd. (b)); retaliation for reporting unsafe working conditions (Lab. Code, §§ 6310, subd. (b), 232.5); failure to indemnify (Lab. Code, § 2802); religious/ancestry harassment under the FEHA (Gov. Code, § 12940, subd. (j)); retaliation under FEHA (Gov. Code, § 12940, subd. (h)); failure to prevent harassment, discrimination and retaliation under FEHA (Gov. Code, § 12940, subd. (k)); wrongful termination in violation of public policy; and violation of the Unfair Practices Act (UPA)

[2] The arbitrator later determined this claim, which was unrelated to the termination of Vogelgesang's employment, was time-barred and without merit.

(Bus. & Prof. Code, § 17200 et seq.). It attached various documents that defendants assert fell under the confidentiality provision of Vogelgesang's employment agreement.

On May 29, defendants filed a demand for arbitration. The demand alleged that defendants and Vogelgesang had entered into an employment agreement that included a mandatory arbitration provision providing that all disputes related to his employment must be resolved through arbitration. The demand stated defendants had received counsel's letter and draft complaint that he "threatened to file" in superior court, despite the arbitration provision. The sole claim defendants sought to arbitrate was a request for declaratory judgment stating that defendants had not committed "any of the statutory or other violations that Vogelgesang has alleged."

On October 2, Vogelgesang filed his complaint in superior court, alleging the nine causes of action summarized above. The complaint sought compensatory damages, attorney fees, and punitive damages of "not less than" $250 million dollars.

On October 5, Vogelgesang answered the arbitration demand. He disputed the validity of the agreement, argued the arbitration clause was unconscionable, and asserted that the court, not the arbitrator, must determine the issue of arbitrability. The arbitrator subsequently issued a case management order. Among other things, the arbitrator set a briefing schedule on the issue of arbitrability.

The issue was briefed, and the arbitrator issued a nine-page order on November 9, addressing and rejecting each of Vogelgesang's arguments on the arbitrability issue. With respect to Vogelgesang's complaint, the arbitrator agreed those claims were arbitrable and could be asserted as counterclaims in the arbitration, but ruled he could only address the issues before him. He had no jurisdiction to order claims pleaded in a complaint filed in superior court to arbitration. The arbitrator also expressly declined to rule on whether the claims alleged in the superior court action were compulsory counterclaims, or as to any preclusive effect an arbitration ruling might have.

On November 16, defendants filed a petition to compel arbitration of the complaint, in superior court, discussing the language of the employment agreement requiring that all claims be arbitrated. The petition to compel also described defendants' declaratory relief arbitration, stating that the arbitration had been proceeding for five months and a hearing was set for April 2016. Thus, defendants argued, Vogelgesang's claims were already being litigated.

Vogelgesang opposed, arguing the court, not the arbitrator, must decide unconscionability and arbitrability issues. Among other things, he argued the arbitration agreement was both procedurally and substantively unconscionable. In December, while the petition to compel was pending, the arbitrator filed an order rejecting Vogelgesang's unconscionability arguments.

On January 15, 2016, the court issued an order rejecting Vogelgesang's argument that his complaint was not arbitrable and concluded he had not met his burden to show the arbitration agreement was unconscionable. The court also rejected an argument by Vogelgesang that his complaint was not arbitrable because it included a request for injunctive relief, finding such relief was available under the agreement. The court, therefore, granted the petition to compel arbitration of Vogelgesang's complaint and stayed further action.

Before the arbitrator once again, Vogelgesang submitted a motion for judgment on the pleadings, seeking dismissal of defendants' declaratory relief action. The arbitrator denied the motion. In a conference with the arbitrator prior to the arbitration, Vogelgesang's counsel stated that Vogelgesang would not be asserting his claims in the present arbitration and reserved his right to assert his claims in future arbitrations.

The arbitration was conducted from April 6 to 12, 2016. The proceedings were transcribed, but only a few pages are included in the record. According to the

award, 11 witnesses were heard from, and the parties "introduced voluminous documentary evidence." They also submitted closing briefs and gave closing arguments.

The arbitrator entered a 24-page final arbitration award in September 2016. The arbitrator found that declaratory relief was a remedy that could properly be sought in an arbitration forum based on the agreement of the parties. Because the arbitration clause at issue in this case was broad, it encompassed the declaratory relief claim, and further, the arbitrator had discretion whether to allow the claim to proceed. The arbitrator found good cause for allowing the declaratory relief claim based on the facts and history of the case. With respect to burden of proof, the arbitrator determined that defendants had the burden of demonstrating a case or controversy that was appropriate for declaratory relief, and Vogelgesang had the burden of proving the allegations in his draft complaint and the complaint filed in superior court.

On the merits, the arbitrator found in defendants' favor as to each claim. Among other findings, on the key claims of retaliation, the arbitrator credited testimony (including admissions by Vogelgesang) that he had routinely altered e-mails to "exaggerate fire and life safety issues." Once this was discovered, the trust between Vogelgesang and his employer was destroyed. "That destruction of trust, combined with deteriorating relationships between [Vogelgesang] and AAM executives, which had been developing over a period of years, lead to [Vogelgesang]'s departure from H&S, and not any alleged retaliation against [Vogelgesang] for reporting life safety issues or advocating for solutions." Accordingly, the arbitrator concluded that defendants "did not commit any of the unlawful or wrongful conduct" alleged in Vogelgesang's draft or filed complaint.

The arbitrator denied defendants' request for over $1.4 million in attorney fees and $46,920.90 in costs. The arbitrator also concluded that defendants were responsible for the arbitration costs and arbitrator's fees, pursuant to the arbitration agreement.

On October 12, defendants filed a motion to confirm the award. On October 24, Vogelgesang filed a motion to vacate. The motion to vacate argued the arbitrator lacked jurisdiction to issue a declaratory relief award, the arbitrator exceeded his authority by awarding relief not authorized by law, and the award violated California public policy and unwaivable statutory rights. The motions were fully briefed and the court held a hearing on December 9. The motions were taken under submission and the court issued its order several weeks later.

The court denied the petition to vacate and granted the petition to confirm the award. The court noted its prior decision granting the petition to compel arbitration, and observed that despite that ruling, Vogelgesang had neither initiated a separate arbitration nor sought leave to include his claims in the pending arbitration. Indeed, as we noted above, Vogelgesang had expressly advised the arbitrator that he did not intend to assert his claims in that arbitration.

With respect to Vogelgesang's argument that the arbitrator lacked jurisdiction to grant declaratory relief or exceeded his authority by doing so, the court disagreed. The court concluded the arbitrator had both the jurisdiction and the discretion to hear the claim.

As to Vogelgesang's claim that the declaratory relief action violated public policy by giving defendants control of the case, the court found this was undermined by the procedural posture of the case. "As this Court already determined, Plaintiff was required to arbitrate his claims in the very forum already underway. And he had ample opportunity to assert his claims as cross-claims. That he did not, was ultimately the result of his strategic choice, not Defendants." The court confirmed the arbitration award and entered judgment. Vogelgesang now appeals.

II

DISCUSSION

California Arbitration Statutes and Standard of Review

"The California Arbitration Act (CAA; [Code Civ. Proc.,] § 1280 et seq.) 'represents a comprehensive statutory scheme regulating private arbitration in this state.'"[3] (*Cooper v. Lavely & Singer Professional Corp.* (2014) 230 Cal.App.4th 1, 10; see *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 (*Moncharsh*).) Under the CAA, "[t]he scope of judicial review of arbitration awards is extremely narrow because of the strong public policy in favor of arbitration and according finality to arbitration awards. [Citations.] An arbitrator's decision generally is not reviewable for errors of fact or law." (*Ahdout v. Hekmatjah* (2013) 213 Cal.App.4th 21, 33; see *Moncharsh, supra*, 3 Cal.4th at p. 11.)

Judicial review of an arbitration award is ordinarily limited to the statutory grounds for vacating an award under section 1286.2 or correcting an award under section 1286.6. (*Moncharsh, supra*, 3 Cal.4th at pp. 12-13; *Sunline Transit Agency v. Amalgamated Transit Union, Local 1277* (2010) 189 Cal.App.4th 292, 302-303.)

There are, however, certain "narrow exceptions" to the general rule of arbitral finality. (*Moncharsh, supra*, 3 Cal.4th at p. 11.) Vogelgesang argues various exceptions apply here, including his contention that the arbitrator lacked jurisdiction.

As for the relevant standard of review, "[t]o the extent the trial court made findings of fact in confirming the award, we affirm the findings if they are supported by substantial evidence. [Citation.] To the extent the trial court resolved questions of law on undisputed facts, we review the trial court's rulings de novo. [Citation.] [¶] We apply a highly deferential standard of review to the award itself, insofar as our inquiry encompasses the arbitrator's resolution of questions of law or fact. Because the finality

[3] All further undesignated statutory references are to the Code of Civil Procedure, unless otherwise indicated.

of arbitration awards is rooted in the parties' agreement to bypass the judicial system, ordinarily '"[t]he merits of the controversy between the parties are not subject to judicial review." [Citations.]' [Citation.]" (*Cooper v. Lavely & Singer Professional Corp., supra,* 230 Cal.App.4th at pp. 11-12.)

Nature of Declaratory Relief

"'The fundamental basis of declaratory relief is the existence of an *actual, present controversy* over a proper subject.'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) Declaratory relief "is designed in large part as a practical means of resolving controversies." (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 648.)

A person may bring a claim for declaratory relief, "in cases of actual controversy," to obtain a judicial "declaration of his or her rights or duties with respect to another." (§ 1060.) The statutory language allows for "an extremely broad scope of an action for declaratory relief." (*Otay Land Co. v. Royal Indemnity Co.* (2008) 169 Cal.App.4th 556, 562.)

"[T]he courts require that a legally cognizable theory of declaratory relief is being pursued, in order for such a cause of action to be stated. A matter is not justiciable or appropriate for resolution through declaratory relief unless the proper criteria are present. . . . [U]nder California rules, an actual controversy that is currently active is required for such relief to be issued, and both standing and ripeness are appropriate criteria in that determination. [Citation.]" (*Otay Land Co. v. Royal Indemnity Co., supra,* 169 Cal.App.4th at pp. 562-563.) To be ripe for adjudication, a controversy """"must be definite and concrete, touching the legal relations of parties having adverse legal interests. [Citation.] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" [Citations.]' [Citation.]" (*Id.* at p. 562.)

The Arbitrator's Jurisdiction

Vogelgesang's first argument is that the arbitrator did not have jurisdiction to hear the claim because defendants' attempt to seek declaratory relief was improper. He claims the only issue between the parties were "fully-matured causes of action" which made declaratory relief improper.

The scope of an arbitrator's powers is determined by the arbitration agreement. (*Kelly Sutherlin McLeod Architecture, Inc. v. Schneickert* (2011) 194 Cal.App.4th 519, 529; *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 543 ["in determining whether the arbitrators exceeded the scope of their powers here, we first look to the parties' agreement to see whether it placed any limitations on the arbitrators' authority"].) The arbitrator's determination that he acted within the scope of his powers is due "substantial deference" and any ambiguities in the scope of such powers is resolved in favor of coverage. (*Id.* at p. 542.) The extremely broad arbitration clause here stated that "[a]ny and all disputes . . . that arise out of Employee's employment," were subject to arbitration, explicitly including claims of discrimination and FEHA claims. This is broad enough to include defendants' declaratory relief claim.

To the extent Vogelgesang argues that the statutory provisions found in the Code of Civil Procedure limit the scope or availability of declaratory relief, we reach the same conclusion the arbitrator and the trial court did, and disagree. As defendants' correctly argue, sections 1060 and 1061 are primarily procedural statutes, and do not create substantive rights. (See *Mackay v. Whitaker* (1953) 116 Cal.App.2d 504, 511.) An action for declaratory relief generally sounds in equity, and is designed to ensure a court (or arbitrator) can administer complete relief. (*Westerholm v. 20th Century Ins. Co.* (1976) 58 Cal.App.3d 628, 632, fn.1.) Because the parties agreed to follow the substantive law of California but the "rules and regulations" of the arbitration firm, any

statutory limits on declaratory relief – and the case law based on those statutes – do not apply here.

Further, even if we did not agree with the arbitrator on this point, we would still find the arbitrator's jurisdiction proper. Unlike the cases Vogelgesang cites, the parties here had an ongoing controversy and ongoing relationship created by the employment agreement and Vogelgesang's allegations of ongoing wrongdoing. The confidential information provision in the agreement included both business and proprietary information and trade secrets, as well as personal and business information regarding the Samueli family. This provision explicitly stated it survived the termination of employment.

When Vogelgesang sent defendants his carefully timed and highly inflammatory "demand letter," threatening that "all of this information will become public," and completely ignoring both the confidentiality provision and the arbitration clause, an actual, ongoing controversy came into existence between the parties. Vogelgesang's letter indicated that he had no intention of voluntarily arbitrating his claims and maintaining the confidentiality required by the agreement.[4] Once Vogelgesang's allegations became public, there was no putting the genie back in the bottle. Defendants had little choice but to seek some sort of relief in the forum the parties had mutually chosen, arbitration, and they had a strong and fully legitimate interest in quickly resolving Vogelgesang's claims. Declaratory relief may be sought even if a case calls for the resolution of "past wrongs," so long as prospective relief is also requested, as it was in this case. (*Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal. App. 4th 357, 366.) Thus, defendants' decision to seek, and the arbitrator's decision to eventually grant, declaratory relief was proper.

[4] Defendants' concern over the confidentiality provision was well taken. Nearly a year after the arbitration, Vogelgesang was continuing to argue various documents were not confidential.

The Declaratory Relief Remedy

Vogelgesang next argues the court erred by declining to vacate the arbitration award because it was a remedy unauthorized by law, essentially arguing that the arbitrator had no jurisdiction in a slightly different way. He contends the arbitrator's conclusions that Vogelgesang's claims had no merit and that defendants did not commit the conduct alleged was beyond of scope of applicable declaratory relief.

As we have already explained, however, limits under section 1060 do not apply to this case, because the arbitration agreement did not limit the type of relief the parties could seek. Thus, California authorities interpreting that section are unhelpful. As we also noted, declaratory relief sounds in equity, and it was therefore proper in this case for the arbitrator to permit the relief he deemed appropriate.

Public Policy

Vogelgesang suggests a parade of horribles if the arbitration result is allowed to stand, arguing that declaratory relief "violated long-standing California public policy embodied by the Labor Code and FEHA protecting Appellant from retaliation by allowing Respondent to circumvent the legislative protections afforded to employees in order to prevent employers from retaliating against employees who bring matters of great public concern to light." But FEHA claims are routinely arbitrated, and Vogelgesang is simply wrong. Nothing was circumvented; Vogelgesang had the full panoply of due process protections available to him.

He argues the arbitration "was unquestionably done to discourage Appellant to bring his own FEHA/whistleblower lawsuit by preemptively dragging him th[r]ough unwanted costly and time-consuming litigation for no other reason but to silence him and to teach him a lesson that he should not have raised his FEHA and whistleblower violations in the first [place]." This argument is so far afield from accurately reflecting the record that it is hard to know where to begin.

First, nobody forced Vogelgesang or his counsel to send a highly inflammatory – indeed, plainly threatening – letter to defendants at a moment calculated to cause them the most difficulty possible. This was entirely his choice, and it put defendants in a situation where they were forced to choose between some kind of legal action and the credible threat of their agreement with Vogelgesang being ignored entirely.

Second, Vogelgesang agreed to arbitration – not litigation – and one of the goals of arbitration is to reduce both costs and the time it takes to hear cases. (*Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 704.) It was Vogelgesang, not defendants, who chose to file his claim in superior court after participating in the arbitration process for months. This prompted defendants to file a motion to compel arbitration, thereby making the case both more time consuming and costly.

Third, Vogelgesang was never "discouraged" or prevented from bringing his claims as cross-claims in the arbitration proceedings, which would have given him the opportunity to seek damages and other remedies. He explicitly and intentionally chose not to do so. As the arbitrator noted: "Following the Superior Court's order compelling arbitration of Respondent's claim, Respondent obtained leave from the arbitrator to amend his answer, but did not seek to assert his claims in this arbitration. In a pre-hearing conference with counsel on March 2, 2016, it became clear that Respondent's decision not to assert his claims in this arbitration was intentional, not inadvertent." Despite Vogelgesang's decision, a full hearing was held on the merits of his allegations, and Vogelgesang had the opportunity to present witnesses, documents, and argument.

Accordingly, no "unwaivable rights" are implicated here, and Vogelgesang's rights under FEHA were not limited – he simply chose not to avail himself of them. That was his decision. Not every action by an employer against an employee or former employee is retaliatory,[5] and the authority Vogelgesang cites does not say otherwise. By attempting to frame the facts in this manner, Vogelgesang completely ignores his own role in defendants' decision to file the arbitration. They were not required to sit back and wait for Vogelgesang to carry out his threats, ignoring both the arbitration and confidentiality clauses of the employment agreement. They had every right to seek relief, and they sought the relief available under the agreement, which was not with the court, but through arbitration. Despite Vogelgesang's assertion to the contrary, the facts do not support a claim that the arbitration was filed as retaliation; indeed, the facts strongly support that it was filed to seek an appropriate conclusion to the dispute between the parties. Vogelgesang's fears of the end of FEHA are, therefore, wildly overblown.

[5] To support his claim that the declaratory relief arbitration was "retaliatory," Vogelgesang points to the fact that defendants sought $1.4 million in attorney fees after the arbitration was over. No attorney fees were awarded, and the fact that they were sought is completely irrelevant. Nor could it have the chilling effect Vogelgesang seems to believe, given that he was unaware of the amount of any request until after the arbitration's conclusion.

III

DISPOSITION

The trial court's orders denying the motion to vacate and granting the motion to confirm the arbitration award are affirmed. Defendants are entitled to their costs on appeal.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.